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Symposium, Standards of Professional Conduct in Alternative Dispute Resolution

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SYMPOSIUM

Standards of Professional Conduct in Alternative Dispute Resolution

*John Feerick, Carol Izumi, Kimberlee Kovach, Lela Love,
Robert Moberly, Leonard Riskin, & Edward Sherman¹*

The Alternative Dispute Resolution Section of the Association of American Law Schools presented a program, at a 1995 AALS Conference, on current ethical issues that arise in mediation and how these issues should be addressed by the standards of professional conduct. The panel for the program was composed of leading mediation scholars and practitioners from throughout the country. The program was organized by Professor Edward Sherman who also acted as the panel moderator and provided the following introduction.

I. INTRODUCTION

Mediators and ADR neutrals increasingly view themselves as a part of a distinct profession.² Many are already associated with another profession -- lawyers, psychologists, therapists, social workers -- and are subject to the standards of those professions. However, there is a growing consensus that ADR raises distinctive issues of professional conduct that cannot be fully comprehended by the codes of the individual professions.

ADR is unique in being interdisciplinary and interprofessional. ADR neutrals perform in a distinctive role and not as members of their own profession. The ADR process demands adherence to policies like voluntariness, respect for party autonomy, and confidentiality, which, in turn, make special ethical demands on ADR neutrals. Thus there are compelling reasons to contemplate an

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2. The concept of professionalism, writes Burton J. Bledstein, has evolved out of an attempt "to define a totally coherent system of necessary knowledge within a precise territory, to control the intrinsic relationships of their subject by making it a scholarly as well as an applied science, to root social existence in the inner needs and possibilities of documentable worldly processes." BLEDESTIN, *THE CULTURE OF PROFESSIONALISM* 88 (1976). A concomitant feature is a sense of responsibility to the clients of the profession and an obligation to comply with the professional standards of conduct and ethics.

interdisciplinary code of conduct that addresses the professional duties and obligations of ADR neutrals.

Standards of conduct for ADR has been a much discussed and debated topic over the past decade, both as to source and content.³ The two principal sources of standards have been the profession and the government.

The standards of conduct of individual professional groups are still the primary source of regulation in most states. Codes of professional conduct tailored to mediation and ADR have been issued by various professional organizations.⁴ In addition, consortia of professional groups and umbrella organizations that include a number of individual professions have promulgated standards. Such groups, however, lack enforcement power, and have to rely upon the individual professions to undertake enforcement sanctions against one of their members.

A long-awaited study of qualifications by the Society of Professionals in Dispute Resolution (SPIDR) issued in 1989 concluded that no single entity, but rather a variety of professional organizations, should establish qualifications; that the greater the degree of choice the parties have over the ADR process, the less mandatory should be the qualification requirements; and that the qualification criteria should be based on performance, rather than on paper credentials.⁵

Most recently, three prestigious organizations -- the American Arbitration Association, the American Bar Association, and SPIDR -- formed a Joint Committee on Standards of Conduct. In 1994 it issued a draft of proposed standards of conduct for mediators which would affect the members of those organizations, and those standards will be particularly consulted as we address specific ethical questions in this program.⁶

The second source of standards for conduct of ADR professionals comes from various forms of government regulation. Particularly as courts have begun to "annex" ADR processes as an integral part of litigation procedures, there has been increasing concern with providing regulation of ADR neutrals through legislation or court rule. Some states have assigned responsibility for establishing training and qualification standards, credentialing, and supervising of ADR professionals to a governmental or quasi-governmental body. In Florida, for example, the Florida Supreme Court adopted procedural rules for mediation and arbitration,⁷ as well as standards for qualifications and professional conduct.⁸

3. See M. SHAW, SELECTION, TRAINING, AND QUALIFICATION OF NEUTRALS (National Symposium on Court Connected Dispute Resolution Research Working Paper for the State Justice Institute, Oct. 15-16, 1993).

4. See, e.g., ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (SPIDR) (1987), see Appendix; PROFESSIONAL STANDARDS OF PRACTICE FOR MEDIATORS (Mediation Council of Illinois, 1985); CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS (Colorado Center for Dispute Resolution, 1982).

5. REPORT OF THE COMMISSION ON QUALIFICATIONS OF THE SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION (SPIDR) (1989).

6. See JOINT COMMITTEE ON STANDARDS OF CONDUCT (Proposed draft, Dec. 30, 1993).

7. See *In re Amendments to Florida Rules of Civil Procedure*, 536 So. 2d 85 (Fla. 1990).

The Office of the State Courts Administrator was established in the Supreme Court building to administer and monitor the regulations governing ADR practice. A Mediator Qualifications Board composed of three regional divisions has power to investigate complaints, hold hearings, and impose sanctions for violations of the standards.⁹

If there is no agreement as to the source of the professional standards in ADR, there is also no consensus as to content. However, there is a good deal of agreement as to what standards should be addressed. For example, a Texas Task Force on Professional Standards¹⁰ concluded, after surveying ADR practitioners, that an interdisciplinary code should address:

1. Neutrality of ADR neutrals (including the duty to make full disclosure in advance as to the qualifications, prior experience, and compensation to insure against conflicts of interest, and not to impose the neutral's views on the parties nor use coercion or undue influence in attempting to obtain a resolution of the dispute).
2. Professional responsibilities (including maintaining the integrity of the ADR process, maintenance of skills and training, and only taking cases within one's competency level).
3. Advance notice to clients of relevant matters (including the ADR process of techniques used and enforceability of agreement).
4. Avoidance of impropriety (including use of information obtained in the process and relationships with referral sources).
5. Duty and scope of confidentiality.
6. Avoidance as to professional conduct (including such matters as limitations on advertising).
7. Fair and equitable fee structure, fully disclosed to clients in advance.

There is less agreement as to the exact standards that should apply in these areas. Furthermore, once one moves from standards of conduct to requirements as to qualifications, training, and credentialing, there is even less agreement in the ADR community.

8. FLORIDA RULES OF CIVIL PROCEDURE, PROFESSIONAL CONDUCT, AND RULES OF DISCIPLINE FOR CERTIFIED AND COURT-APPOINTED MEDIATORS, Rules 10.010-10.290 (May 28, 1992).

9. *Id.* at Rules 10.190-10.290.

10. REPORT OF THE TASK FORCE ON THE QUALITY OF ALTERNATIVE DISPUTE RESOLUTION PRACTICE IN THE STATE OF TEXAS (1993).

We are particularly concerned in this program with the specific content of standards of professional conduct for ADR neutrals. I will ask our distinguished panel to consider a number of hypotheticals in identifying the standards that should be applied.

II. PANEL DISCUSSION

PROFESSOR SHERMAN: The topic of our program this morning, and I want to thank all of you for being here. The last program, we sort of wondered if this panel of six would end up getting to speak to a panel of six, but it's gratifying to have many people who are here and interested in ADR. Our topic today is standards of professional conduct in ADR. As you all know, this is a hot topic in the world of ADR today as, in my mind, we see ADR going through yet another phase in its development. Mediators and third-party neutrals in ADR increasingly view themselves as part of a distinct profession. Many of them are already associated with another profession; lawyers, as all of us in this room probably are; psychologists; social workers; and so forth. But, increasingly there has been a feeling that ADR raises distinctive issues of professional conduct that cannot be fully comprehended by the individual codes of professional conduct and responsibility that we may be subject to as professionals within our own area. And so, one of the aspects of the last five years, maybe ten years within the ADR community, in states around the country, has been to attempt to identify those standards that ought to apply across the board to ADR neutrals. And one of the more difficult aspects, of course, is that should they be process distinctive. A feeling that in some cases the standards might be quite different for mediation compared to other forms of ADR.

In most states, standards and enforcement of conduct by ADR professionals are left entirely to whatever professional organizations an ADR neutral might belong to. There has been no attempt to set-up a governmental body to oversee it. Even to set-up some kind of inter-disciplinary professional body. So lawyers look to their codes, social workers look to their codes and so forth. The result has been that over the past twenty years or so there are proliferation of codes that govern the conduct of an ADR neutral. And you are all familiar with various ones. There are codes for family mediators, for labor arbitrators and mediators, for social work intermediaries, for lawyers who do specialized kinds of mediation such as family law and so forth. When you look at these codes there is a core of agreement as to many, many aspect and principles. But there is also a fair degree of difference. And this has led in recent years to a belief that somehow these codes ought to be homogenized and somehow we ought to have some supercodes. Before I mention the supercode, which we are going to be talking about today, that is the code that has been recently promulgated by three important ADR committees, let me talk about one other piece of the building block in the ADR profession.

That is not just the standards of conduct, but the qualifications issues. Increasingly the question has gone on around the states "should there be some

notion of what kind of training? what kinds of degrees? what kinds of other qualifications an ADR neutral ought to have?" And this question has taken on added urgency as we have seen the court annexation of mediation and other ADR processes. Because then the question is what kinds of credentials one ought to have in order to be qualified for court appointment.

The long awaited report of SPIDR in 1989 is a very important building block, but it certainly did not solve all the problems. SPIDR chose not to adopt a, what some might call a rigid set of qualifications; they rejected the notion that certain kinds of degrees should be essential, and that certain kinds of paper credentials should be required; instead they looked to performance and evaluation kind of criteria to determine whether one was qualified or not. Those criteria are necessarily fairly vague, and they still left for individual determination, state by state basis as to the specifics. So we have these two strands, one is a set of behavior standards for mediator and mediation or an ADR neutral and another form of ADR, we also have the questions of qualifications.

The most recent step in this development was the issuance last spring of the Report of the Joint Committee on Standards that is made up of three organizations: The American Bar Association, the American Arbitration Association and SPIDR. We have two of the members of this committee on our panel today and as a starting point, all of our panelists will refer to these particular standards. I am sorry to say I don't have copies to hand out to all of you, these Standards of Conduct from the Joint Committee. I will pass around a sign-up sheet and if you put your name and address down, we'll see that you get sent a copy if you don't already have one.

We're going to attempt today to take up what we consider some of the more pressing issues of professional standards, and we have six members of the panel and we have divided it up so that I am going to pose a question or hypo that we hope will raise particular professional qualification issues to each of our panel members. And then I am going to ask those panel members to respond and react fairly shortly to that question, ask for comments by the other panel members, and then at several times during the morning, I am going to open it up and ask for your participation in the audience. So that's the format that we're going to use. And we will probably refer to the standards of the joint committee, but other standards as well. Comprehensive standards have been drawn up in several states. The ones that come to mind immediately are Florida, which probably has the most elaborate scheme along with the administrative scheme under the Supreme Court not only for the promulgation of standards, but also for certification and monitoring of the profession. They have also been drawn up in Texas as part of a project of the Texas State Bar Association. Other standards in Colorado, and there are other states. You will probably hear our panelists refer to some of those standards as well as to the ones we are talking about.

Let me introduce briefly our panelists and then we will begin with the questions I want to pose to them. In alphabetical order, we have Professor Carol Izumi, a professor of clinical law at George Washington University National Law Center; where she teaches a mediation clinic and course. Carol is also an active

mediator. Next is John Feerick, Dean of Fordham University School of Law. Dean Feerick has served as a mediator and an arbitrator. He represented the AAA on the joint committee that promulgated these standards and was chair of that committee. We will ask him for some of the drafting history on these rules. Professor Kimberlee Kovach is a professor of law at South Texas College of Law, and also an adjunct professor at University of Texas School of Law. She is an officer of the ABA's Section on Alternative Dispute Resolution, and she was also on the joint committee, as to which she served as a reporter. She has also published a book for use in teaching mediation in law schools. Professor Lela Love is a professor of clinical law at Cardozo School of Law Yeshiva University in New York City. She teaches a mediation clinic and course and supervises a program in ADR. She is an active mediator. Professor Robert Moberly teaches at the University of Florida College of Law. He was a member of the Florida Supreme Court Committee on Mediation and Arbitration. Florida is the state that has had the most ambitious program for credentialing and monitoring the ADR profession, which has been done through the Supreme Court Committee of which he is a member. He also chaired the Ethical Standards Committee for the Supreme Court that drafted the Florida Rules of Conduct for Mediators and is on the SPIDR Commission on Qualifications. Professor Len Riskin is a professor at University of Missouri-Columbia School of Law. I am sure he is known to most of you because he's one of the pioneers in the academic field of dispute resolution. He has written widely on ADR, and is Director of the Center for the Study of Dispute Resolution at the University of Missouri-Columbia.

Let me turn to Len Riskin to whom I'm going to put the first question: Should a mediator ever, and if so, under what circumstances, provide an evaluation of the strengths of the parties' positions? Or should a mediator ever provide an opinion as to the likely outcome of the trial? Or should he ever give an estimate of what he or she thinks the likely verdict will be if the case goes to trial? Or should he use a decision tree analysis indicating what he thinks the probably verdict might be? Should a mediator ever give an opinion on a legal issue? Should a mediator provide her own proposal for settlement?

PROFESSOR RISKIN: I think these are very controversial questions. I want to demonstrate how controversial they are first, and then suggest that they needn't be very controversial, that the reason for the controversy is almost a semantic problem.

As an example of how controversial this subject is, Jim Alfini says, and this is a quote from the ABA Journal, "Lawyer-mediators should be prohibited from offering legal advice or evaluations." And Baruch Bush agrees and pushes it even further. He suggests in his proposed standards that giving legal or therapeutic information or advice, or otherwise engaging, during mediation, in counseling or advocacy, should not be permitted, and that a mediator should never give his or her professional opinion on an issue or an option for settlement. That is one side. Another side comes from Gerald Clay, who is a well known lawyer-mediator in Honolulu. This is a quote: "Effective mediation almost always requires some

analysis of the strengths and weaknesses of each party's position should the dispute be arbitrated or litigated." And he meant analysis from the mediator.

Just quickly, a few words about some of the ethics standards. I don't think they clear this up very well. For lots of good reasons. The joint standards, with which I hope you will all become familiar if you are not already familiar, because they will be very important to all of us. During the negotiations of the Standards, as I understand it, and Dean Feerick may have a word about that, this was a very difficult issue in that most members of the committee wanted to say something in the direction of prohibiting mediators from doing evaluations. They came up with what I understand is a compromise, and in standard 6, they talk about quality of process and emphasize the importance of the role of the mediator and the difference between the role of the mediator and the role of other professionals. Essentially, they caution mediators about providing professional advice and say it is dangerous to mix the role of mediator and the role of other professionals and that if a mediator undertakes additional dispute resolution roles, the mediator assumes increased responsibilities and obligations which sounds kind of ominous to me. I think I would paraphrase this by saying, we don't really like this, but we can't stop you from doing it so if you do it you might get into trouble. I think that's the thrust.

The Texas standards also seem to rely on the idea of self determination, and they say that the mediator should not coerce a party in any way, but may make suggestions. A mediator should not give legal or other professional advice. I gathered from Ed that this was also controversial when these standards were developed. Colorado has had standards for mediators since about 1982. They say that a mediator should be prepared to provide both procedural and substantive suggestions and alternatives, but should be careful about intervening because of the power that the mediator might have. None of these standards seem to bar evaluations. They all seem to circumscribe them in some way.

And then we come to the Florida standards, which Bob Moberly was involved in and which he has written about. They seem to allow evaluation by this sentence: "While a mediator has no duty to specifically advise a party as to the legal ramifications or consequences of a proposed agreement, there is a duty to tell them how important it is that they understand these consequences." But then in rule 10.090D, it deals with personal opinions. It says, "While a mediator may point out possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how a court, in which the case has been filed, will resolve the dispute." Bob has indicated that the purpose of this rule is to prohibit, this is a quote from his article in the *Florida State Law Review*, "... to prohibit tactics that will imply some special knowledge of how a particular judge will rule." So it sounds like they are saying, evaluation is okay in Florida, but if you know too much, or purport to know too much, don't use it.

I guess what holds all these standards together is the concern that evaluation will get in the way of self-determination. I agree that's a risk, and I also want to suggest that there are situations in which evaluation can enhance self-

determination. I don't want to give an example now, but I think most of you know what I mean, and maybe we could talk about it later.

The reason I think we have all this confusion is that most people in the mediation world have a picture of mediation in their minds; they think that what they consider mediation is mediation and other ways that people practice "mediation," perhaps is not mediation. My notion is that mediation should be thought of broadly to include any kind of a facilitated negotiation and that we need to have better terms for different kinds of mediation.

So I want to propose a system for talking about mediation so that we can have clearer conversations about what we mean by the term.¹¹ I look at two questions when I try to categorize approaches for mediators.¹² One is: Does the mediator tend to define problems narrowly or broadly? So, for example, the narrow problem definition might be how much does A pay to B? A broad definition would touch on the interests of the parties and try to come up with a problem-solving, collaborative kind of resolution. The other continuum which is the extent to which the mediator tends to evaluate or facilitate.

The answers to each of these questions, fall along continuums. If we depict them graphically, we would have something like this. Each of these quadrants describes the predominant orientations that most mediators have. Thus, a lot of mediators who tend to have a narrow problem definition and tend to evaluate. The most prominent among them are judges and retired judges, with apologies to Judge Evans, who is really the father of mediation in Texas, and to Judge Gafni from Villanova, who has just joined this section. I am not suggesting that either of you mediate that way, but most judges when they mediate, do.

Then there are many other mediators who are narrow, but facilitative. The most prominent examples are found among the mediators who work for United States Arbitration and Mediation, Inc. On the other side, we have mediators who are broad -- looking at all the interests -- but tend to be evaluative, tend to tell people in some sense what they ought to do. And then over here we have the facilitative and broad orientation. This is the one I tend toward, and a lot of people who came into mediation about the time I did came in with that orientation. This grid seems to describe the way people think about mediation. And there are all kinds of exceptions and caveats, and people move around to some extent and all that. We don't have time for me to discuss these issues.

Let me just say how evaluation fits in. The facilitative mediator asks questions, focusses discussion and helps the parties negotiate. Moving up from the evaluative-facilitative continuum, evaluative mediator probes, makes assessments, makes predictions, for example, about what would happen in court predictions about the impact of non-settlement on the parties' interests, develops proposals, and urges the parties, or pushes them to accept a particular proposal or to reach a settlement. The further up we go, the closer we get to other processes. At some

11. This approach is set forth in LEONARD L. RISKIN, *MEDIATOR ORIENTATIONS, STRATEGIES AND TECHNIQUES, ALTERNATIVES FOR THE HIGH COST OF LITIGATION* 12 (Sept. 1994).

12. *Id.*

point around the top we would say, "Okay, this isn't mediation anymore." The question Ed put to me is whether mediators should evaluate and make predictions. The answer to the question should depend on what it is that the parties bargain for when they go into these mediations. In other words, if the parties intelligently decide that they want the narrow evaluative mediation, then the answer to the question is, yes; the mediator ought to evaluate and it is ethical and it's perfectly appropriate. And if the parties intelligently decided that they wanted the broad facilitative mediation then it's inappropriate for the mediator to evaluate unless they jointly decide to change the nature of the mediation. That's the principal point that I wanted to make. Now the difficulty with all this, which we don't have time to talk about is how in a given case the parties and the mediator ought to decide what kind of a mediation should take place. But we don't have time for that. Next year maybe we could talk about that.

DEAN FEERICK: Let me just point out what the standards say, rather than give my own view of it. I do have some views of it. What the standards encourage is a facilitative role by the mediator, helping the parties to arrive at a mutually acceptable, voluntary, uncoerced resolution of their problem. The standards also urge the importance of impartiality in terms of the role of the mediator. This raises an issue when the mediator functions other than a facilitator. You're correct that the standards didn't say that an evaluative role is prohibited. I would not say that the language was intended to be ominous or anything of the sort, except that the more that a mediator took on an evaluative role, there might be other standards applicable. For example, a lawyer mediator who is providing legal advice and legal judgements may very well have responsibilities under the professional code of ethics. And that is what we were trying to say there. So we recognize that there was evaluation going on in the field. Our committee did not view mediation as an evaluative kind of process, however, but rather as a process premised on the self determination of the parties. We as a group did not buy into mediation as an evaluative process, but if people wanted to develop an evaluative process, but if people wanted to develop an evaluative process and call it whatever they wanted to call it, that's something else. It's neutral assessment, it's some other kind of process, in my opinion. We thought it would be dangerous to label mediation as other than a party's self determination process. I would just also say that I have less problem with an evaluative role by a mediator where parties are represented by counsel, where parties are sophisticated. Some of the dangers that one would worry about, it seems to me, are minimized by the legal representation present. On the other hand, where parties are not represented, in quarternexed mediation programs, for example, the mediator almost is taking on the mantle of being a judge. And if that is what we want, then I think we have to make sure that mediation has the same kind of procedural and substantive protections with respect to somebody taking on the role of a judge in order to guard against error and imperfection. The more we want to have those kinds of protections, it seems to me, we're not talking about mediation but something else.

PROFESSOR IZUMI: I think that parties in a mediation often expect the mediator to be all of the above. They expect that we will either exhibit facets of each of those quadrants, or that we will sort of move back and forth, be quadrant hoppers if you will. I am more aligned with the Alfini-Bush school of thought on the self determination model of mediation; mediators should avoid giving legal advice. My concern is confusion about the mediator's role in the process, and you'll hear me say the word "confusion" a lot today. It's hard enough being in the mediator's chair as a facilitator, trying to address the parties' needs, meet your competing goals, and perform facilitative functions throughout the process. Encouraging mediators to give legal advice and be more evaluative is, I think, problematic.

PROFESSOR LOVE: Len has made a great contribution in describing the variety of activities being conducted under the name of "mediation." However, if each of the northern quadrants could be given another name, I believe it would be an even greater contribution to the field. "Evaluative mediation" is a contradiction. Evaluation is more closely aligned with non-binding arbitration, neutral evaluation, neutral expert opinion or case assessment than it is with mediation. I would not label the quadrants which include evaluation as mediation at all.

The Joint Committee Standards of Conduct for Mediators define mediation as facilitation and begin with a commitment to party self-determination,¹³ highlighting that the mediator's role is to assist the parties come to their *own* resolutions and accommodations of each other.¹⁴ Throughout the Standards, the vision of the mediator's role is one of facilitation.

Facilitation is a radically different activity than evaluation. Lawyers, the press, and the general public already have a hard time understanding the difference between mediation and arbitration, and frequently one sees these words used interchangeably. I believe the labels Len has chosen will perpetuate confusion about what mediation is. Therefore, I would prefer drawing a bright line around mediation as a process in which the neutral *facilitates* the bargaining of the parties, rather than evaluating the merits of an issue or situation.

PROFESSOR KOVACH: I just want to mention from the reporter-drafter standpoint that this was, in fact, the most controversial segment in drafting these joint standards. While the committee as a whole leaned toward the facilitative, there were one or two people that were adamant that we needed to allow some, - I'll use the term evaluation to include providing professional information or advice. The most compelling argument, to me at least, is the situation where one of the parties is uneducated about the issue, while the other one is much more

13. Standard I. Self-Determination: A Mediator Shall Recognize that Mediation is Based on the Principal of Self-Determination by the Parties.

14. In describing a mediator's role the Preface of the Standards lists the following tasks: "facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving."

sophisticated. An imbalance of power, if you will. However, as compelling as the need for information is, it is also quite bothersome, particularly from a process point. If the mediator provides professional advice and evaluation to the less sophisticated party, then hasn't she lost this neutrality? She has essentially become an advocate for that party.

PROFESSOR MOBERLY: Two comments. One on the Florida code, we did have some evidence at the hearing on the code that there were mediators, and I'm sorry to say this came up mostly in the context of retired judges, who would say, "I was appointed by this judge, I know this judge, I'm pretty sure how this judge is going to rule." And then tell the parties how the judge was going to rule. And that's really what that code provision is designed to prohibit. There was a concern about prohibiting any sort of prediction of income, because many attorneys, particularly in the personal injury field and in civil litigation where parties are represented, in fact do discuss outcomes and evaluations and so forth. So ours was directed at a rather narrow problem with regard to the judge claiming some sort of special knowledge by the judge who appointed him or her. The other distinction I would make, is between professional advice and legal information. For example, in a child custody case, a family matter, many jurisdictions have child support guidelines. I think it is not at all improper if someone is in mediation without counsel, who does not know of child support guidelines, someone who may just want to get out of the marriage and be willing to settle for anything, I think it is perfectly appropriate to call attention to the fact that child support guidelines do exist and that they are by statute and here they are. This is not to say how your case might be effected by them, but to call attention to pertinent information. I think that is an important distinction.

PROFESSOR SHERMAN: I'm going to open it up to the audience in just a moment, but we have a further elaboration on this theme with a hypothetical. Which I want to put to Lela Love. In a suit for wrongful death by a grandson of the deceased, the mediator happens to look at the applicable wrongful death statute over lunch and learns that the grandson has no cause of action under that statute. The defendant has already offered \$25,000, but the plaintiff's last offer was \$200,000. Neither party appears to be aware that the statute provides no cause of action. What should the mediator do under these circumstances?

PROFESSOR LOVE: This problem is troubling because important values are at stake, each value pulling the mediator in a different direction.¹⁵ I will describe the competing values, point out several alternative courses of action, and then describe what I would do. I hope we can then get others' views.

15. For a comprehensive study of dilemmas facing mediators and competing values in mediation, see Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, a special paper published by the National Inst. for Dispute Resolution, Washington, D.C. (1992), republished in 1994 J. DISP. RESOL. 1 (1994).

Informed consent is an important value, incorporated into the Joint Committee Standards of Conduct.¹⁶ Mediators want the parties to base their understandings and decisions on as much information as possible, to be "playing with a full deck." In this problem, it appears that both parties are lacking a critical piece of information that would radically change their litigation option. The mediator naturally wants the parties to have the information.

A second important value is mediator impartiality. This value is recognized by the Standards as "central" to the mediation process.¹⁷ Here the information known to the mediator is very advantageous to one of the parties but is devastating to the other party. If the mediator provides the information, she will color the parties' perceptions of her impartiality, jeopardizing her ability to mediate effectively. The mediator does not want this result.

Third, the mediator's role should not be mixed with that of another profession. The Standards call on the mediator to "refrain from providing professional advice."¹⁸ The mediator's job is to facilitate negotiation, not to give legal advice. In this problem, the mediator has discovered statutory language which appears to negate the grandson's cause of action. If the mediator delivers the information, without doing careful legal research, he may miss some potential exception, or plausible argument for an exception, that a zealous advocate would find. In this hypothetical, giving this highly charged information is closely related to giving professional advice and can be dangerous where the mediator does not fully take on the responsibility of the professional advocate. Here, the mediator does not want to step into the role of a lawyer and be responsible for providing information about the parties' legal rights, which can easily be construed as an opinion.

Finally, the value of party self-determination argues against directive moves by the mediator. The line between information and advice is not a bright one. While the mediator has happened upon information that will influence the parties, she is also aware there is other (unknown) information that might also influence the parties. Providing this particular information is going to be directive, which the mediator does not want to be. So what should the mediator do? I will describe a few possibilities.

The mediator can do nothing with the information, withhold it from the parties and simply continue to mediate. Doing nothing maintains a clear separation between the role of mediator and attorney. In addition, the mediator's impartiality is not compromised in the eyes of the parties. However, doing nothing here neglects the value of informed consent. The mediator has information that will affect the parties but, instead of imparting it, allows the

16. Standard I; Comments (second comment): "A mediator . . . should help . . . the parties make informed decisions." The comment suggests that this should be done by making "the parties aware of the importance of consulting other professionals."

17. Standard II. Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner.

18. Standard VI, (fourth comment): "Mixing the role of a mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice."

parties to "fly blind" into an agreement they might not accept if they had the mediator's information. If the parties come to an agreement and then discover this piece of information the next day, at least one of them will have a very unhappy surprise. The durability of the agreement will be affected if a party feels the agreement is unfair. While the parties were enabled to arrive at an outcome based on self-determination, it is not as good an outcome as it would be if it sat on the bedrock of adequate information. So this choice is not satisfactory.

The mediator can provide the information, either throwing out the relevant statutory provision in a joint session or in private caucuses. Either way, providing the information is directive. There is a world of information; the mediator stumbled across one piece of information; providing it outright is bound to suggest that the mediator endorses the information and that it should influence the parties. I can imagine the defendant saying, "I withdraw my offer of \$25,000," or becoming absolutely inflexible. And I can imagine the grandson storming out of the mediation, feeling that his bargaining position has been undermined and that the mediator took sides. So this choice does not seem satisfactory.

The mediator can urge the parties to get legal advice.¹⁹ This course of action is safe and does not conflict with other values, except perhaps an interest in making mediation efficient in terms of cost and speed. This course of action also is in keeping with the Standards.²⁰ During any mediation, the mediator will consistently be urging the parties to obtain and share information and advice about their situation from a variety of sources, including professionals. In many cases, urging the parties to get appropriate professional advice will resolve the dilemma raised by this problem.

However, in some circumstances the parties do not want or cannot afford to get legal advice, and then the mediator still has the problem of a failure of informed consent. Or it may be that the parties' lawyers have not considered the information the mediator has! In these cases, in addition to the general urging to get legal advice, I believe the mediator should raise specific issues and questions that the parties have not addressed, urging the parties to get more information and legal advice, and/or urging the lawyers to do their homework with respect to the particular issue the mediator raises as well as other issues the mediator may not see. This urging, however, must be done in a non-directive way. I believe the mediator, in a caucus with each party, should explore whether the party has considered the risk of litigation and has weighed any potential weaknesses of positions that are being asserted. The mediator should feel that the party understands the importance of adequate information and understands that there are questions regarding the application of a statutory provision to his or her case. If the mediator does this, he has done his job. He should not cross the line into

19. See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253, 280, n. 75 (1989). See also Robert Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 714 (1994).

20. See *supra* note 4.

giving legal advice as to what is or is not a cause of action or into giving legal information which can easily be construed as advice. Asking questions comports with the mediator's role, but giving or suggesting answers does not. Do we have time to get other viewpoints?

PROFESSOR SHERMAN: Yes, let's see if we have a couple of comments from the audience which we could take at this time. Is there anybody that wants to address this issue? Come on up here and speak into the microphone if you will there.

PROFESSOR WECHSTEIN:²¹ Two quick comments. One, I fully agree that self-determination is the key. Two, I don't see how you can have informed self-determination if you have uninformed determiners. So if there is key information that the parties are lacking, they are not engaging in informed self-determination. Consequently, there has to be some way in which they can become informed, and I think this may have been what Len had in mind when he said that evaluations can aid rather than hinder or enhance self-determination. I agree with what was just said that the mediator should be the source of that information only as a last resort. In addition to suggesting they consult counsel, you might want to suggest that they consult written materials, or in fact in some cases, in information based mediation, which, incidentally at least in California, the AAA uses almost exclusively because that's what the parties want. You can provide in advance key information on things like spousal support schedules and things of that nature. But if push comes to shove, if a party is making a stupid self-determination because the party is not informed, I think the mediator either has to withdraw or get the information out in some way. This is Don Wechstein from San Diego.

DEAN FOLBERG:²² Jay Folberg, San Francisco. I'm curious about the hypothetical which I think is a good one. In the Northern District of California where the court has both an early neutral evaluation and a mediation program, this issue has come up because the judges are in disagreement about whether the early neutral evaluators or the mediators, all of whom were very experienced federal litigators, should, in cases in which the parties are represented by attorneys, inform the attorneys or the parties, when there is a mistaken notion of law of which the neutral is aware. And the court is divided on that, and looking at your hypothetical let's try to make it a little more realistic. In a wrongful death case involving a claim of \$200,000 there surely will be attorneys on each side. And I'm assuming that the monetary defendant will be an insurance company. That raises the questions, and I won't try to answer, but I'd like to hear more responses, of one, is this notion of informed consent changed in its application when we realize that in this case the supposed uninformed party is an insurance company represented by sophisticated counsel. That doesn't mean that they won't make

21. Professor Donald Wechstein is from the University of San Diego School of Law.

22. Dean Jay Folberg is from the University of San Francisco School of Law.

mistakes, so it's not totally unrealistic that they might not be aware of a new statute, though it's unlikely, but let's stick with that hypo because I think all of us with our perhaps humanistic values may say, well I do believe in informed consent if this grandson didn't know, sure, we'd have to do something. However, is informed consent applicable in the same way given an insurance company and representation by sophisticated counsel and our own sense of justice perhaps. Which shouldn't of course be part of any mediation process. And secondly, given that there are attorneys, does that change the notion of what the role of mediator might be, assuming a lawyer-mediator who does know that one of the attorneys is wrong? I'd be interested, or might not be informed.

PROFESSOR EVANS:²³ I'm Frank Evans from Houston, formerly with JAMS (Judicial Arbitration and Mediation Services), now with South Texas College of Law. I've, I guess I've watched this both ways. Three and a half years at JAMS, I've watched what Len calls the evaluative approach, and that's kind of the way I was trained by your people from Florida. But I find that does not work as well because it, pure evaluation where you give opinion and you push and shove, because it makes you more ineffective, in my opinion, as a neutral. It displays you're not quite as neutral. Questions I gather you all think is okay. I've never heard someone say it's inappropriate to ask questions. Here's this case, why do you think you can get around? That seems to me to be more effective, but I don't know. I know that some of the very best mediators in our area are the highly pushing evaluative type. And that's what the lawyers want. I'm talking about lawyer cases where lawyers are there, you're not worried about dealing directly with a client and they're picking up on something as a legal opinion because they've got a lawyer. So I look at it as what makes you most effective. Contrary to Len, I'm a white guy but I've learned to jump and I think I'm more facilitative, just because that's the way I feel comfortable. I wish I were comfortable being more evaluative. On the other question it seemed pretty clear to me what to do, because it happens all the time. If you've got lawyers present, constantly we'll be in the middle of mediation, Eric I know this happens to you, and one of the lawyers won't be aware of a case that affects the outcome. You might argue whether it would or would not, but what do you do? If you raise it in an open session, you are obviously going to create some negative feeling on one side or the other. Just like if you did it and you're judge in court and you're not supposed to be involving yourself in their briefing. But I think if you've got a lawyer, what I'd do is take him out so I don't embarrass him in front of his client, the one that's going to be affected by it negatively, and say, "have you read this case? You ought to look at it because here you are claiming this and this is what it may do to you." But it seems, that's just the way I do it, there may be a better way, but I don't see that violates any premise of confidentiality, it doesn't put anybody at a disadvantage and all you've done is bring something home to them. It's where you deal pro bono and this kind of question has been with the dispute

23. Professor Frank Evans is from the South Texas College of Law.

resolution centers forever. Here you're sitting, you're supposed to be concerned about balance of power, but you're not supposed to get into the act. And suppose you've got somebody with their fence six inches over or two feet over on somebody else's property, the statute of limitations is about to run and you're sitting there helping them get an agreement that will avoid that statute of limitations impact, and you don't tell anybody. That's the tough one. I don't know the answer to what to do there.

PROFESSOR SHERMAN: I want to put a question here to Dean John Feerick. How do the standards deal with situations of power and imbalance? Suppose one party seems to be intimidated by the other and prepared to accept almost any solution. Or, suppose a party lacks the sophistication and knowledge that you feel is necessary to avoid an unjust result.

DEAN FEERICK: Let me briefly describe what the standards say. The standards are very quick and very brief on the subject, but meaningful I think. First of all, I want to state again that the standards speak very strongly about this being a self-determined process where the mediator is the facilitator, helping the parties arriving at a voluntary agreement that is not coerced. The standards also speak very strongly, as I mentioned before, concerning the subject of impartiality. The mediator should not show favoritism or bias or be an advocate for one of the parties. That's central to the proposed standards. The standards also say that the mediator should work hard to ensure a quality process and to encourage mutual respect. Obviously, these are very general words. What do they mean in terms of the subject that you've raised. It seems to me that the standards, in the comment part of the standards, provide some additional help, but perhaps not ultimately decisive in terms of what you do as a mediator. As mentioned before, the standards say that a mediators should make clear to the parties at times the importance of consulting other professionals. If they want to have the involvement of other professionals, they should certainly take advantage of that and the process needs to accommodate that. The standards also say that in order to have an appropriate self-determined process, the parties have to have the requisite physical and mental capacity to engage in a process of dispute resolution. In a situation where they may be a gross disparity of power or a disparity in terms of knowledge, there's always the option for the mediator to terminate the mediation, if he or she is unable to provide other assistance to deal with the imbalance. I have been thinking about the previous example concerning the statute of limitations. I thought perhaps as a lawyer-mediator I would be at the point of having to terminate the mediation. If one party wasn't aware of a statute that I knew existed, and the other party was pushing ahead for a lot of money that in a perfect world the person wasn't entitled to, it seems to me that the gross disparity of understanding concerning that subject would be a basis for a mediator to conclude that this mediation should terminate. Obviously in dealing with power imbalances there are a lot of techniques that mediators can bring to bear that may minimize some of the ethical issues that are confronted. I've had situations where

it was clear that one party was overwhelming the other and therefore I conducted much of the mediation through caucuses and shuttle diplomacy as a mechanism for trying to deal with an obvious disparity in the situation. A mediator, however, can't depart from the standard of impartiality. It may well be in particular settings that one party has a better case than the other. A mediator who wants to even the odds, so to speak, so that both parties walk away with a result that the mediator believes is fair, could be producing an unfair process. I think all a mediator can hope to do is work with the parties by, for example, information gathering, exploring all the different interests that might be involved, and raising questions about the reliability of the stronger party's position. It is appropriate for a mediator to engage in a certain amount of reality checking in the process. That may do something about the power imbalances that were initially manifested. For myself, if I felt that despite all of the techniques I was not able to be satisfied that the process was fair, I would end the mediation. It seems to me the conscience of the mediator is a touchstone, an important measure of whether of it's a fair process. I don't understand the role of the mediator to be one where he or she is to be passive on the issue of whether or not the process has been fair. So the standards do not nail it down as to how you deal with power imbalances. They just simply give you these guidelines about impartiality and using techniques in the process that may have a way of balancing off some of the inequities and power imbalances.

PROFESSOR SHERMAN: We only have time for one brief comment. Anyone who wants to comment on that or take issue? Either the panel or in the audience?

PROFESSOR RISKIN: This is a difficult issue, but one way to think about it is in terms, again, of the conception of mediation that you're dealing with in a particular case. If the parties have gone into a narrow, evaluative mediation and there is a power imbalance, and the issue is whether the mediator ought to make an evaluation, again I think the answer is yes. The power imbalance becomes relatively less important as you move up into the northwest corner of the grid. The evaluation of the legal merits becomes more important, so if that's what the parties all want, I think it's unreasonable for us to say, "well that's not mediation," or "that's not ethical." It is in fact a form of mediation that is being practiced everyday and perhaps is the most common form of mediation in this country, so I think we ought to be careful about making distinctions.

PROFESSOR SHERMAN: I want to move on to confidentiality. The hypo that I want to put to Carol Izumi involves something that all of you are familiar with. The mediator learns information in a caucus that the other side had information that might induce the other side not to settle or not to settle on the terms that are being presented. I'm going to use a hypo from Bob Baruch Bush's fine article on ethical considerations that many of you are familiar with. This is the hypo: In a business mediation of a suit for non-payment of a loan, the parties agreed to a settlement in which one of the major items is the assignment to the lender of an

interest in a law suit that the borrower has filed against a third party. The borrower tells the mediator confidentially that the lawsuit is somewhat tenuous and he may not even have enough funds to carry through with his undertaking although he hopes to.

PROFESSOR IZUMI: The standard relating to confidentiality provides: "A mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy."

Looking at the standard for guidance, I think we have to break it up into two sections. The first part is the expectation of the parties. Clearly, there is an expectation among the parties going into any mediation session that the discussion and communications will remain confidential. In fact, we mediators foster this expectation by including some assurance of confidentiality in our introduction to the process. And it is universally recognized that public policy favors protection of mediation confidentiality. The second part, of course, is more troublesome. Under what circumstances would a mediator be "required by law or other public policy" to reveal a confidential communication? To answer this question, we have to look at the various exceptions to mediation confidentiality. In the short time I have, I thought it would be helpful, not knowing your level of familiarity with this topic, if I did a brief survey of the statutory exceptions to confidentiality to see what they dictate. I mentioned earlier that you were going to hear me say the word "confusion". The most enlightened thing I can tell you about exceptions to confidentiality is that this area is quite confusing!

We've seen a tremendous proliferation of mediation legislation in the past few years, much of it dealing with confidentiality. The most common statutory exception is by agreement. These statutes allow the mediator to disclose a confidential matter if the parties agree.²⁴ And the standard incorporates this by including the language "unless given permission by all parties."

The second exception that is fairly common is where the disclosure relates to a breach of mediator duty²⁵ or a subsequent action between the mediator and

24. See, e.g., ARIZ. REV. STAT. ANN. § 12-2238(b)(1) (1993); ARK. CODE ANN. § 2-7-202(b) (Michie 1993); CAL. EVID. CODE § 1152.5(a)(4) (West 1994); COLO. REV. STAT. § 13-22-307(2)(a) (1993); CONN. GEN. STAT. § 46b-53a (1993); FLA. STAT. ANN. § 44.102(3) (West 1994); IND. CODE ANN. § 4-6-9-4(b)(2) (West 1994); MICH. COMP. LAWS § 691.1557(1)(a) (1993); MISS. CODE ANN. § 69-2-47 (1993); MO. REV. STAT. § 17.06(a) (1991); MONT. CODE ANN. § 26-1-811 (1993); NEB. REV. STAT. § 25-2914 (1994); N.H. REV. STAT. ANN. § 328:C(9) (1993); N.D. CENT. CODE § 31-04-11 (1993); OR. REV. STAT. § 36.205 (1991); TENN. CODE ANN. § 36-4-130(b) (1993); TEX. CODE ANN. § 154.053(b) (West 1994); UTAH CODE ANN. § 78-31b-7(1) (1993); VA. CODE ANN. § 8.01-581.22 (Michie 1993); WASH. REV. CODE § 5.60.070(1)(a) (1994); WIS. STAT. ANN. § 904.085(4)(b) (West 1994); WYO. STAT. § 1.43-103 (1993).

25. See, e.g., ARIZ. REV. STAT. ANN. § 12-2238(b)(2) (1993); COLO. REV. STAT. § 13-22-307(2)(d) (1993); N.D. CENT. CODE § 31-04-11 (1993).

a party for damages arising out of mediation.²⁶ Some statutes, such as the one in Florida,²⁷ contain an exception for any matter that relates to a potential disciplinary action against the mediator.

A third, and quite broad, exception requires disclosure by the mediator to protect the integrity of the mediation process. I have broken this exception down into three specific categories. The first is to enforce the actual agreement to mediate. The Arizona statute provides an example of this.²⁸ The second category involves enforcing the mediated agreement.²⁹ And the third category is where an issue exists as to the validity of the mediated agreement.³⁰ These kinds of issues might be fraud, duress, or some misrepresentation.

A fourth statutory exception, one you are no doubt familiar with, is where the evidence is otherwise discoverable.³¹ Of course, that exception brings us to the evidentiary and discovery laws of the particular jurisdiction, which opens a huge can of worms. Thankfully, I don't and can't get into a dissection of that today!

An exception that has become increasingly common requires the mediator to reveal any statement indicating an intention to commit a crime.³² You may recall the concerns raised several years ago when the *Tarasoff* case³³ came out about the duty of professionals to disclose confidential statements in order to protect the well-being of some individual. A related but narrower exception in some jurisdictions only mandates disclosure of matters related to child abuse.³⁴

A sixth exception, sort of a catchall, provides for disclosure of confidential information to uphold the administration of justice. Administration of justice matters that would fall under this exception include proving the bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to

26. See, e.g., MICH. COMP. LAWS § 691.1557(1)(b) (1993); NEB. REV. STAT. § 25-2914 (1994); OKLA. STAT. ANN. tit. 12, § 1805(f) (West 1994); OR. REV. STAT. § 36.205(2)(b) (1991); TENN. CODE ANN. § 36-4-130(b)(2) (1993); VA. CODE ANN. § 8.01-581.22 (Michie 1993); WASH. REV. CODE § 5.60.070(g) (1994).

27. FLA. STAT. ANN. § 44.102(4) (West 1994).

28. ARIZ. REV. STAT. ANN. § 12-2238(b)(4) (1993).

29. See WYO. STAT. § 1.43-103(c)(v) (1993).

30. See N.D. CENT. CODE § 31-04-11 (1993).

31. See, e.g., CAL. EVID. CODE § 1152.5(a)(6) (West 1994); COLO. REV. STAT. § 13-22-307(4) (1993); HAW. REV. STAT. § 408 (1993); LA. REV. STAT. ANN. § 9:332 (West 1993); MICH. COMP. LAWS § 691.1557(2) (1993); MINN. STAT. ANN. § 494.02 (West 1993); MO. REV. STAT. § 17.06(a) (1993); NEB. REV. STAT. § 25-2914 (1994); NEV. REV. STAT. § 48.109(2) (Michie 1993); N.C. GEN. STAT. § 7a-38(8)(c) (1993); OR. REV. STAT. § 36.205(2)(c) (1991); TENN. CODE ANN. § 36-4-130(b)(3) (1993); TEX. CODE ANN. § 154.073(c) (West 1994); VA. CODE ANN. § 8.01-581.22 (Michie 1993); WASH. REV. CODE § 5.60.070(b) (1994); WIS. STAT. ANN. § 904.085(c) (West 1994); WYO. STAT. § 1.43-103 (1993).

32. See, e.g., NEB. REV. STAT. § 25-2914 (1994); N.J. REV. STAT. ANN. § 34:13A-16(h) (West 1993); N.D. CENT. CODE § 31-04-11 (1993). In New Hampshire, this exception includes past felonies and misdemeanors. N.H. REV. STAT. ANN. § 328:C(9) (1993).

33. *Tarasoff v. Regents of the Univ. of California*, 17 Cal. 3d 425, 551 P.2d 334 (1976).

34. See, e.g., TENN. CODE ANN. § 36-4-130(b)(5) (1993); UTAH CODE ANN. § 30-3-28(4)(a) (1993); WIS. STAT. ANN. § 907.085(4)(d) (West 1994); WYO. STAT. § 1.43-103(c)(iii) (1993).

obstruct a criminal investigation or prosecution.³⁵ In my jurisdiction, the District of Columbia Court of Appeals in a recent case, *In re Waller*,³⁶ was faced with the question of an attorney's claimed exemption from discipline based on privileged communications during mediation. The attorney, representing the plaintiff in a medical malpractice case referred to mediation by the trial court, made a confidential statement to the mediator that he had not listed the surgeon as a defendant because the surgeon was his client. When the attorney refused the mediator's directive to bring the matter to the trial court's attention, the mediator contacted the judge and told him about the possible conflict of interest. Although the mediator's action was contrary to the non-disclosure provision in the mediation order, the mediator felt compelled because of the effect on the administration of justice in the Superior Court.³⁷ The judge referred the matter to the Board on Professional Responsibility which found that the attorney violated the disciplinary rules. The Court of Appeals upheld the proposed discipline without addressing the issue of confidentiality but noted in a footnote that the confidentiality requirement was not intended to preclude disclosures "such as that made by the mediator to the judge in this case."³⁸

Another situation which would fall under the administration of justice exception is if the mediator has reason to believe a party has given perjured evidence or a material misstatement of fact which would constitute perjury if made under oath.³⁹

A relatively new and narrow exception is based on the public policy behind the sunshine laws.⁴⁰ That is, if a governmental subdivision is a party in the mediation, facts and circumstances surrounding the dispute or information provided by that governmental subdivision has to be out in the open and is not protected by confidentiality.

Finally, there are two statutory exceptions that force you to go elsewhere to answer the question. The first provides that the confidentiality requirement yields to any other legal requirement if there's a conflict.⁴¹ The second aspect, and

35. See, e.g., HAW. REV. STAT. § 408 (1993); N.C. GEN. STAT. § 7a-38(8)(c) (1993); WIS. STAT. ANN. § 904.085(4)(e) (1994).

36. *In re Waller*, 573 A.2d 780 (D.C. 1990)

37. *Id.* at 781.

38. *Id.* at 785 n.5.

39. See, e.g., IOWA CODE ANN. § 679.12 (West 1993); N.H. REV. STAT. ANN. § 328:C (1993); UTAH CODE ANN. § 78-31b-8(c) (1993).

40. See, e.g., FLA. STAT. ANN. § 44.102(3) (West 1994); IOWA CODE ANN. § 679.12 (West 1993).

41. See, e.g., NEB. REV. STAT. § 25-2914 (West 1993); WIS. STAT. ANN. § 767.11(5) (1994). In Arkansas and Texas, the issue of confidentiality may be presented to the court to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure. See ARK. CODE ANN. § 16-7-106(c) (Michie 1993); TEX. CODE ANN. § 154.073(d) (West 1994).

you'll see this in the Florida standards, is that mediation confidentiality gives way if the provisions of another statute so state.⁴² Again, it begs the question.

And so, in my short time period, I am able to tell you that there are now approximately forty state statutes which poke large holes in the shroud of mediation confidentiality. In many jurisdictions, you have the difficult task of deciphering common law to figure out when a breach of confidentiality is required. Case law might be unclear or conflicting. For mediation practitioners, the best world is where Lela practices, New York. The New York confidentiality statute contains no exceptions. And the court has stated that there basically ought not be any situation when confidentiality is breached. I'm sure many of you know about the *Snyder* case⁴³ where the defendant and the victim he killed were parties to an earlier mediation. The defendant raised a self-defense claim and the prosecutor subpoenaed the mediation records of the community dispute resolution center, arguing that the defendant waived any privilege. The court held that public policy embodied in the statute guaranteed absolute confidentiality. The court quashed the subpoena, holding that the privilege was not waivable even by the parties.

Getting back to the hypothetical, there doesn't appear to be a requirement in law or other public policy that would override the borrower's expectation of confidentiality in disclosing the fact that he is not 100% sure he can actually come through with a particular term. I would look at this hypo as what Baruch-Bush calls less of an ethical dilemma and more of a goal dilemma, being torn between self-determination and letting the parties enter into their own agreement versus my goal of having a fair agreement and ensuring that the settlement will actually go through. As we all know, getting an agreement isn't the answer, we want to make sure the agreement helps resolve future disputes; it actually puts an end to the underlying conflict. I know I'm running out of time but the final comment I would make is that we practitioners have to be extremely mindful about our ability to meet the parties' expectations of strict confidentiality. The hot media story of the day seems appropriate here we have to be very careful that we don't turn into Connie Chung, asking the parties to whisper to us, and then it's all over town!

PROFESSOR SHERMAN: I want to put a question to Kim Kovach. A first year law student comes to you and says that he wants to be a professional mediator and wonders if he needs to remain in law school. How does one determine who is competent to be a professional mediator?

PROFESSOR KOVACH: Well, of course, he should stay in law school and take all of our dispute resolution courses first. But the question isn't sufficiently addressed in the standards, and I'm not sure it should be. Standards of conduct

42. See, e.g., ARIZ. REV. STAT. ANN. § 12-2238(b)(3) (1993); COLO. REV. STAT. § 13-22-307(2)(c) (1993); FLA. STAT. ANN. § 44.102(3) (West 1994).

43. *People v. Snyder*, 129 Misc. 2d 137, 492 N.Y.S.2d 890 (Sup. Ct. 1985).

and codes of ethics tend to govern a professional's conduct after she has become a professional. It is my impression the question goes to how one becomes competent in the first place, which I will address. But first, let me mention that the standards do say that a mediator shall be truthful regarding training, education, and expertise. The comments to the appropriate standard further provide that a mediator may make reference to meeting state, national and private organizational qualifications only if the entity referred to has such a procedure. Most groups do not yet have procedures in place, yet individuals are holding themselves out as having been "certified." For example, in Texas a colleague was speaking to a group of about 100 insurance adjusters and asked how many of them had been to mediation. Nearly the entire room raised their hands. He then asked how many had mediated with a certified mediator in Texas. They all raised their hands. Of course there is no such thing in our state. So there is some problem regarding the public's perception, and that is a concern of mine.

If we are going to be a profession, and I think we are demonstrating a tendency in that regard by enacting codes, then I think we have a duty to assure competency. I know that time is limited, I have divided these competency related issues into four main points to examine. One is the initial qualifications needed in order to go to the second level, which is training and education, or what I call mediator school. The third consideration is one of testing and evaluation, and the fourth is the need for continuing professional development.

What initial qualifications should individuals possess before they are admitted to mediator school? I think there is a tension here. We need to become professional, and yet at the same time, if the requirements are too great, we are cutting off access to a number of individuals. But I still think that we are going to see the time where we are going to require a four-year college degree, or at least an equivalent, such as work experience to get into mediation school. Now, what is mediation school, or rather what should mediation school consist of? A number of states have a requirement of forty hours of training, which I believe came from the original neighborhood justice movement.⁴⁴ As I learned, hearsay only, the reason for the forty hours was the number of days they could get the hotel rooms. Not a very good way, I think to determine education. We must then determine the duration of mediation school, and the curriculum. I know this is going to be controversial, but mediation school ought to be at least one year long. There may be exceptions where individuals demonstrate proficiency and/or previous education in specific skills. I think the curriculum should combine both theory and law, along with skill training and development. Moderators must understand the theory of mediation, and underlying conflict. Unfortunately, a body of law is developing - the law of mediation. Legal aspects include matters such as confidentiality and liability. And just as all pharmacists must know the law of pharmacy, likewise, all mediators must know the law of mediation.

44. See ROGER F. COOK ET AL., NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT (1980).

The curriculum must have a significant portion devoted to skills. We know that with the MacCrate report, the emphasis is not just on knowing about the law, but on lawyering. Likewise, mediation school ought to be at least probably two-thirds skill development. But, the question was, how do you determine who is competent to practice mediation? That element will be accessed by our testing and evaluation component. The theory and the law will be tested in a one day exam, much like the bar exam I suppose. But testing competence is more difficult. One method of assessment is the direct observation of the student by the instructor. Another is the student's own self assessment by the use of videotaped live or simulated sessions. And I do both of those. And a third which I have developed is called a video exam. At the time of the final exam, a videotaped mediation session is shown. The video is stopped periodically and a question appears. They respond in the blue book with their answer. The issues deal with specific situations, much like the hypothetical presented today only the problem is presented in a more realistic fashion. If you pass these various components of testing, then you are a professional mediator. In conjunction with that designation or licensing, I suppose we should institute requirements of continuing education, specialization, and last but not least, unfortunately designing, Florida has already done this and the Virginia Supreme Court has a system in place, a method for grievance and complaints about mediators. I understand that the primary concern is, and I know a lot of you will disagree with me, but if we allow anyone to mediate, as we do in our state, a number of problems occur. I have heard a number of complaints from the public. Their perception of mediation harms the process, its future and all of us.

PROFESSOR SHERMAN: Our last topic sweeps across all of the matters we have been talking about here. A lawsuit is filed in a state that has mandatory mediation. Who should select the mediator? The judge? Court clerk? The parties? Or some random method of selection from a list of approved mediators? Or some combination of these?

PROFESSOR MOBERLY: Thank you, Ed. The question of who selects the mediator raises a number of ethical concerns, including self-determination, quality of the process, competence, conflict of interest and appearance of impropriety.

In my opinion, the parties should have the right to select the mediator when, as is often the case, they are required to pay for mediation. I am disturbed by the trend of state laws which give judges rather than parties the power to appoint mediators under such circumstances. Judicial selection of mediators, it seems to me, violates notions of self-determination and party empowerment; significantly degrades the quality of the mediation process; and increases the risk of impropriety and even corruption.

First, the primary purpose of mediation is to allow party self-determination and empowerment. Virtually all the mediator ethical codes set forth self-determination as a major (often the major) principle and goal of mediation. Self-determination in the selection of the mediator is a logical application of this

principle. Applying self-determination to the mediator selection process would allow parties first choice in selecting their mediator, if they can mutually agree. The judge should appoint only if the parties cannot agree. Even if the parties cannot agree, the appointment probably should be made on a rotation basis from among qualified mediators.

If the parties are empowered to choose their own mediator, they are more likely to be satisfied with both the process and the outcome. For example, they can use Len's grid to select an evaluative or facilitative mediator who uses a narrow or broad problem definition, depending on their needs. Moreover, the parties probably will have more confidence in individuals they select, thereby leading to a greater likelihood of settlement. Thus, we have the happy circumstance where the sometimes-conflicting goals of self-determination and judicial efficiency both would be enhanced by party selection of a mediator.

Second, the quality of the mediator can best be assured when the marketplace governs the selection of the mediator. As in many endeavors, the market does more to assure mediator competence than government certification programs and the like. In the systems of civil litigation which require parties to compensate mediators, the parties are almost always represented by counsel. Attorneys in mandatory mediation systems learn very quickly the competencies of the various mediators. Their choice (and the fact that they had the right to make this choice) is more likely to result in a successful outcome than an judicially-imposed selection. Moreover, in our economic system, parties who pay for a service provider normally have the right to select the provider. I see no reason to deviate from this practice in selecting mediators. The principle of party choice in selecting mediators has been utilized for decades in labor relations with great success.

As a third argument against judicial selection of mediators, I would cite the dangers of conflict of interest, appearances of impropriety and even potential corruption. In our hearings in Florida, it was revealed that mediators commonly gave gifts such as liquor, flowers, candy and more to judges and court personnel. When our committee proposed a ban on such gifts, there was much initial resistance, although eventually such a ban was adopted. In Connecticut, a judge was convicted of taking kickbacks from mediators.

The simple notion of party choice in selecting mediators has proven to be enormously controversial, and that controversy is likely to be played out in many states and federal district courts in the years ahead. As in Florida, many jurisdictions have established committees considering these issues, usually comprised of judges, mediators, a few trial lawyers, and an occasional academic or two. Judges generally want to retain the power to select the mediator, rather than relinquish this power to the parties. The established mediators serving on such committees know the judges, so they are happy with the system. The established mediators also have an interest in limiting the number of mediators, and one way to do that is to limit the parties right to select their mediator. Self-interest, unfortunately, is sometimes present in these deliberations.

In Florida, I proposed, with the support of Professor (now Dean) Alfini, that the parties have ten days to select the mediator. This proposal was fought tooth and nail. The committee's first draft provided for judicial selection of the mediator. Professor Alfini and I wrote a draft minority report advocating party selection of the mediator. Eventually, our minority proposal was accepted unanimously by the committee and by the Florida Supreme Court.

We also proposed, and the Court accepted, the notion that when parties select mediators, they should not be limited to members of the Florida Bar or those who fulfill other provincial requirements found in state mediation statutes and local federal rules. Why should Jimmy Carter, Bill Usury, Ed Sherman or Len Riskin be precluded from mediating in Florida if the parties mutually want their expertise and ability? Again, the proposal was quite controversial, but ultimately successful.

To my knowledge, Florida was the first jurisdiction to create the right of parties to select their mediator for court-connected mediation. The concept has been enormously successful, with parties selecting their mediators in over ninety percent of the cases. It has been followed elsewhere, but many jurisdictions have left mediator selection solely in the hands of the judge, without participation of the parties. This reflects an unwarranted lack of confidence in the parties and in self-determination. If the parties are free to select the mediator, they will select the one most likely to resolve the dispute.

PROFESSOR SHERMAN: Just to add a word about the Texas experience, and I have a group of Texas colleagues here in the front row. Correct me if I am mistaken. The state bar ADR committee drafted a model order for judges to suggest how judges should refer cases to mediation. The question was should you use the method you've just suggested which is give the parties ten days or some period of time to select their own, or not. The argument was made that one's delay is sometimes inefficient and that beside the judge has the ultimate responsibility for ensuring that the mediator is qualified and therefore the judges ought to do it. A compromise was finally reached in which the judge sends out and order appointing a mediator and then the parties have 10 days to essentially get together and agree that they want to overturn that assignment. The problem is of course that already that mediator is before them, the parties now know that the judge wants them to use that mediator. The parties may be a little bit fearful of overturning in. Besides, now they have to agree on it as opposed to making it as initial matter. There is one county at least, correct me folk from Texas, I believe it is using a random selection method.

AUDIENCE: This practice is bound to change at least in Houston because of the judges being concerned about their images and most of them now give the parties the right to select. Because their policy was thrust on them they said.

JUDGE GAFNI:⁴⁵ Having just left the bench four months ago, before this last election, we had no man in Pennsylvania, we had no man recording appointments but I would be appointing the ambassadors and trustees and all sorts of people who serve as intermediaries, all firm break-up, or mental breakup or whatever it was then. I think that the thing you have to do to the judges is to display to them that have greater self-interest than appointing their friends and making sure they have income and that self-interest is that if I have the right person appointed, or if the person appointed by the intermediary, there is a greater likelihood of the resolution of the matter. If someone, in this group could do a study which would indicate that there's a higher percentage, or greater percentage or likelihood of success in that circumstance, it might be something that this judge said is in their self-interest to allow the parties to select.

PROFESSOR KOVACH: In Dallas county, we've been keeping records for many years and it may be true in Houston as well, on the performance of mediators and the perceptions of the parties and the attorneys. The judges have full access to those evaluations and some of the judges I know, in Dallas county, do have a list of mediators that they like to use, but for many of them it's, I think not really based on cronyism so much as it is on their assessment based upon those years of evaluative reports of which mediators really do a good job and the parties really like; both the process, the outcome, and the mediator. So, maybe that is another criteria we should also consider.

PROFESSOR LAREAUX:⁴⁶ I just want to make one comment, kind of an overview. I'm Homer Lareaux, Howard University, I'm also a member of the Committee on Qualifications for SPIDR. One of the things that we've been very concerned with as we move towards this notion of professionalization is the notion of maintaining diversity within the upcoming professional, as we professionalize ourselves. There are lots of people who have been doing mediation, been doing it effectively, who do not have formal paper qualifications. And I think that we ought to be very careful as we begin to move towards professionalization because as we do it, we're going to exclude, and if we do that I think we're going to lose some very important expertise. I'm not saying, the point that you made about the need to protect the consumer is quite valid, it's something we've been grappling with on the commission. But I really do want to emphasize the importance for us to keep in mind that we want to maintain the diversity that is now, or has been historically within the mediation ranks.

HARDIS: Bobby Hardis, New Orleans. The question I have is regarding the bills that are being passed or implemented around the country. I think the trend is to, for states to enact statutes based on Florida, California, and Louisiana. I know

45. Judge Abraham Gafni recently left the bench and became a professor at Villanova University School of Law.

46. Professor Homer Lareaux is from Howard University.

we're in the process of doing it here. I said Florida, California, and Texas. We're in the process in Louisiana and Mississippi on working with the ADR Committees and getting bills to be introduced to the legislature. My question is, are there studies or articles written on the Texas bills, Texas, California, Florida, where there are analyses of the pitfalls of the issues we have been debating? I have been in numerous seminars but legislators often ask what is there written to talk about whether this provision is bad, and this is why. For example, qualifications, confidentiality, are there such studies or articles which are out there that access for example bills five years later, ten years later, etc.?

PROFESSOR KOVACH: The only in depth written article that I am aware of is one which is going to be published this spring in the *South Texas Law Review*. One of our students analyzed confidentiality in mediation, in particular some of the problems with the confidentiality portions of the Texas statute.⁴⁷ I'm not sure of the specific publication date.⁴⁸

JUDGE GAFNI: I just might add that this is probably a role of the Education Committee of the ABA, ADR section. But when we've got Brother Alfini and Sister Kovach here, but they won't give any budget, so until that's done, I guess you just get it from an individual state. While I have the mike I'd like to ask this distinguished panel is there any trend or concern or fear that you perceive from your sitting these various commissions that this is going to end up a lawyers only profession? Is there a concern that all these things are going to be written so that the specs just deal with lawyers?

PROFESSOR MOBERLY: Yes, this is a significant concern. Most members of these commissions and committees are lawyers, and in my opinion this has lead to an overly restrictive view of who is qualified to mediate. There has been an effort to limit the number of mediators by limiting both who may serve as mediators and who may choose mediators. Opponents of such limitations must constantly battle to broaden the ability of parties to choose their own mediators, and to broaden the qualification requirements for serving as a mediator. If the parties cannot reach agreement, then more restrictive mediator lists might be utilized by the court. But, in Florida, parties are selecting their own mediators in over ninety percent of the cases. In my opinion, the best method of quality control is to give parties their choice of mediator. They aren't going to choose people they don't have confidence in. I totally agree with the comment that this will increase the likelihood of settlement.

PROFESSOR IZUMI: I just wanted to add about the Virginia experience. In Virginia when the General Assembly was contemplating the ADR statute, there

47. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053, 154.073 (Vernon Supp. 1995).

48. Comment, *The Mediator's Dilemma: the Legal Requirements Exception to Confidentiality Under the Texas ADR Statute*, 36 S. TEX. L.J. 579 (1995).

was a suggestion that you had to be a member of the Virginia Bar to be certified under our statute, and that was excluded. Now the statute provides, or that they way you get certified is that you don't have to be an attorney, but if you are not an attorney you have to attend a special seminar that deals with court procedures. So we got around that in Virginia. But that was a suggestion.

PROFESSOR SHERMAN: On that note we bring this section to an end.

APPENDIX

The Standards of Conduct for Mediators

INTRODUCTORY NOTE⁴⁹

The initiative for these standards came from three professional groups: the American Arbitration Association, the American Bar Association, and the Society in Professionals in Dispute Resolution.

The purpose of this initiative was to develop a set of standards to serve as a general framework for the practice of mediation. The effort is a step in the development of the field and a tool to assist practitioners in it - a beginning, not an end. The standards are intended to apply to all types of mediation. It is recognized, however, that in some cases the application of these standards may be affected by laws or contractual agreements.

PREFACE

The standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes. The standards draw on existing codes of conduct for mediators and take into account issue and problems that have surfaced in mediation practice. They are offered in the hope that they will serve an educational function and to provide assistance to individuals, organization, and institutions involved in mediation.

49. These standards were approved in 1994 by the American Arbitration Association, SPIDR and the American Bar Association Section on Dispute Resolution.

Mediation is a process in which an impartial third party -- a mediator -- facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to a dispute. A mediator facilitate communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement. These standards give meaning to this definition of mediation.

I. SELF-DETERMINATION:

A MEDIATOR SHALL RECOGNIZE THAT MEDIATION IS BASED ON THE PRINCIPLE OF SELF-DETERMINATION BY THE PARTIES

Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.

Comments:

The mediator may provide information about the process, raise issues, and help parties explore options. The primary role of the mediator is to facilitate a voluntary resolution of a dispute. Parties shall be given the opportunity to consider all proposed options.

A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but it is a good practice for the mediator to make the parties aware of the importance of consulting other professionals, where appropriate, to help them make informed decisions.

II. IMPARTIALITY:

A MEDIATOR SHALL CONDUCT THE MEDIATION IN AN IMPARTIAL MANNER

The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which she or he remain impartial and evenhanded. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

Comments:

A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhance when the parties have confidence in the impartiality of the mediator.

When mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that mediators serve impartiality.

A mediator should guard against partiality or prejudice based on the parties' personal characteristics, background or performance at the mediation.

III. CONFLICTS OF INTEREST:

A MEDIATOR SHALL DISCLOSE ALL ACTUAL AND POTENTIAL
CONFLICTS OF INTEREST REASONABLY KNOWN TO THE MEDIATOR

AFTER DISCLOSURE, THE MEDIATOR SHALL DECLINE TO MEDIATE
UNLESS ALL PARTIES CHOOSE TO RETAIN THE MEDIATOR

THE NEED TO PROTECT AGAINST CONFLICTS OF INTEREST
ALSO GOVERNS CONDUCT THAT OCCURS
DURING AND AFTER THE MEDIATION

A conflict of interest is a dealing or a relationship that might create an impression of possible bias. The basic approach to questions of conflict of interest is consistent with the concept of self-determination. The mediator has a responsibility to disclose all actual and potential conflicts that are reasonably known to the mediator and could reasonably be seen as raising a question about impartiality. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest casts serious doubt on the integrity of the process, the mediator shall decline to proceed.

A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

Comments:

A mediator shall avoid conflicts of interests in recommending the services of other professionals. A mediator may make reference to professional referral services of associations which maintain rosters of qualified professionals.

Potential conflicts of interest may arise between administrators of mediation programs and mediators and there may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment must be to the parties and the process. Pressure from outside of the mediation process should never influence the mediator to coerce parties to settle.

IV. COMPETENCE:

A MEDIATOR SHALL MEDIATE ONLY WHEN THE MEDIATOR HAS THE NECESSARY QUALIFICATIONS TO SATISFY THE REASONABLE EXPECTATIONS OF THE PARTIES

Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's qualifications. Training and experience in mediation, however, are often necessary for effective mediation. A person who offers herself or himself as available to serve as a mediator gives parties and the public the expectation that she or he has the competency to mediate effectively. In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.

Comments:

Mediators should have available for the parties information regarding their relevant training, education and experience.

The requirements of appearing on a list of mediators must be made public and available to interested persons.

When mediators are appointed by a court of institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.

V. CONFIDENTIALITY:

A MEDIATOR SHALL MAINTAIN THE REASONABLE EXPECTATIONS OF THE PARTIES WITH REGARD TO CONFIDENTIALITY

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. A mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.

Comments:

The parties make their own rules with respect to confidentiality, or accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.

If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.

Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.

Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to statistical data and, with the permission of the parties, to individual case files, observations of live mediations, and interviews with participants.

VI. QUALITY OF THE PROCESS:

A MEDIATOR SHALL CONDUCT THE MEDIATION FAIRLY, DILIGENTLY, AND IN A MANNER CONSISTENT WITH THE PRINCIPLE OF SELF DETERMINATION BY THE PARTIES

A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

Comments:

A mediator may agree to mediate only when he or she is prepared to commit the attention essential to an effective mediation.

Mediator should only accept cases when they can satisfy the reasonable expectations of the parties concerning the timing of the process. A mediator should not allow a mediation to be unduly delayed by the parties or their representatives.

The presence or absence of persons at a mediation depends on the agreement of the parties and mediator. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.

The primary purpose of a mediator is to facilitate the parties' voluntary agreement. This role differs substantially from other professional-client relationships. Mixing the role of mediator and the role of a professional advising a client is problematic, and mediators must strive to distinguish between the roles. A mediator should therefore refrain from providing professional advice. Where appropriate, a mediator should recommend that parties seek outside professional advice, or consider resolving their dispute through arbitration, counselling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in the same matter assumes increased responsibilities and obligations that may be governed by the standards of the other professions.

A mediator shall withdraw from a mediation when incapable of serving or when unable to remain impartial.

A mediator shall withdraw from the mediation or postpone a session if the mediation is being used to further illegal conduct, or if a party is unable to participate due to drug, alcohol, or other physical or mental incapacity.

Mediators should not permit their behavior in the mediation process to be guided by a desire for a high settlement rate.

VII. ADVERTISING AND SOLICITATION:

A MEDIATOR SHALL BE TRUTHFUL IN ADVERTISING AND SOLICITATION FOR MEDIATION

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of a mediator should be truthful. Mediators shall refrain from promises and guarantees of results.

Comments:

It is imperative that communication with the public educate and instill confidence in the process.

In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications only if the entity referred to has a procedure for qualifying mediators and the mediator has been duly granted the requisite status.

VIII. FEES:

A MEDIATOR SHALL FULLY DISCLOSE AND EXPLAIN THE BASIS OF COMPENSATION, FEES AND CHARGES TO THE PARTIES

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees shall be reasonable considering, among other things, the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community. The better practice in reaching an understanding about fees is to set down the arrangements in a written agreement.

Comments:

A mediator who withdraws from a mediation should return any unearned fee to the parties.

A mediator should not enter into a fees agreement which is contingent upon the result of the mediation or amount of the settlement.

Co-mediators who share a fee should hold to standards of reasonableness in determining the allocation of fees.

A mediator should not accept a fee for referral of a matter to another mediator or to any other person.

IX. OBLIGATIONS TO MEDIATION PROCESS

Mediators have a duty to improve the practice of mediation.

Comments:

Mediators are regarded as knowledgeable in the process of mediation. They have an obligation to use their knowledge to help educate the public about mediation; to make mediation accessible to those who would like to use it; to correct abuses; and to improve their professional skills and abilities.